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No. 84-1362

IN THE
Supreme Court of the United States

OCTOBER TERM, 1984

PUBLIC SERVICE COMMISSION OF MARYLAND,

Petitioner,

VS.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY
OF MARYLAND,

Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Fourth Circuit

**JOINT BRIEF OF
STATE REGULATORY COMMISSIONS OR THEIR
REPRESENTATIVES, STATES, STATE AGENCIES,
AND RATEPAYER CONSUMER ADVOCATES AS
AMICI CURIAE URGING REVERSAL**

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Amici curiae—consisting of state regulatory commissions or their representatives from the states of California, Alabama, Arkansas, Connecticut, Florida, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, New Jersey, Ohio, Washington, West Virginia and Wisconsin; the Public Service Commission of the District of Columbia; the states of California and Michigan; ratepayer consumer advocates representing the National Association of State Utility Consumer Advocates ("NASUCA") and the states of Florida, Ohio, Maryland, Minnesota and South Carolina; and the National Association of Regulatory Utility Commissioners ("NARUC")—hereby submit their brief in support of Petitioner, Public Service Commission of Maryland. For the reasons set forth below, the United States Court of Appeals for the Fourth Circuit in *Chesapeake & Potomac Tel. Co. of Maryland v. Pub. Serv. Comm'n of Maryland*, 748 F.2d 879 (1984), erred in affirming the District Court's order.

Pursuant to Rule 36.2 of this Court, *Amici* have obtained the written consent of all parties to this case and filed them with the Clerk of the Court.

INTEREST OF AMICI CURIAE

Amici are state regulatory commissions or their representatives; and states, state agencies or ratepayer consumer advocates which regularly appear before state and federal regulatory commissions. Specifically, the California Public Utilities Commission, the Alabama Public Service Commission, the Arkansas Public Service Commission, the Department of Public Utility Control/State of Connecticut, the Florida Public Service Commission, the Iowa State Commerce Commission, the Kansas State Corporation Commission, the Kentucky Public Service Commission, the Louisiana Public Service Commission, the Public Utilities Commission of Maine, the Michigan Public Service Commission, the New Jersey Board of Public Utilities, the Public Utilities Commission of Ohio, the Washington Utilities and Transportation Commission, the Public Service Commission of West Virginia, and the Wisconsin Public Service Commission are administrative agencies established under the constitution and laws of their respective states. The Public Service Commission of the District of Columbia is an administrative agency established under the laws of the district. Among their other duties, these agencies regulate the intrastate rates and services of telecommunication service providers operating within their jurisdictions.

The Minnesota Department of Public Service is an independent agency whose purpose is to represent the interests of all residential and business classes of customers in the State of Minnesota in proceedings involving telephone matters.

The Public Counsel of the State of Florida, the Office of the Ohio Consumers' Counsel, the Maryland People's Counsel, and the Consumer Advocate for the State of South Carolina regularly appear before state and federal regulatory commissions on behalf of consumers in public utility proceedings.

NASUCA is a national organization whose membership consists of thirty-six state public utility consumer advocates, includ-

ing independent state agencies, sections of state attorney generals' offices, and a citizens' utility board.

NARUC is a quasi-governmental nonprofit organization of state officials charged with the duty of regulating telecommunications within their respective jurisdictions. Within its membership are the governmental bodies of the fifty states, and the District of Columbia, the Virgin Islands and Puerto Rico.

Amici have a vital interest in ensuring consistency and certainty in the interpretation, application and enforcement of validly adopted rulemaking orders of the Federal Communications Commission, and in preserving their limited resources devoted to intrastate regulation by avoiding the necessity of defending piecemeal numerous private enforcement actions within their jurisdictions and throughout the nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

The specific rulemaking order of the Federal Communications Commission ("FCC") which Respondent seeks to enforce is the *Memorandum Opinion and Order*, CC Docket No. 79-105, RM-3017, Adopted Dec. 22, 1982, Released Jan. 6, 1983 ("Preemption Order"), which concludes that Congress intended to preempt state depreciation charges and accounting classifications which are inconsistent with federal charges and classifications. *Amici* take the position that this order is invalid because it exceeds the jurisdiction of the FCC as conferred by Congress, and intrudes impermissibly into the sphere of state authority over depreciation of intrastate telecommunications assets, which authority Congress specifically reserved to the states.

The question of the substantive validity of the FCC Preemption Order is pending before this Court in the companion cases of *Louisiana Public Service Commission v. Federal Communications Commission, et al.*, No. 84-871; *People of the State of California and Public Utilities Commission of the State of California, et al. v. Federal Communications Commission, et al.*, No. 84-889; *Public Utilities Commission of Ohio, et al. v. Federal Communications Commission, et al.*, No. 84-1054; and *Florida Public Service Commission v. Federal Communications Commis-*

sion, et al., No. 84-1069. Should the Court reverse the order of the U.S. Court of Appeals for the Fourth Circuit in those cases and thereby invalidate the FCC Preemption Order which is the subject of both Fourth Circuit decisions, then the instant case should be deemed moot. However, should the Court affirm the order of the Fourth Circuit in the above cases and thereby uphold the FCC Preemption Order, it should then reach the merits of the instant case and conclude that Congress conferred authority only on the FCC itself, and not private parties, to enforce the FCC's validly adopted rulemaking orders.

Amici contend in this case that the term "order" as used in Section 401(b)¹ of the Communications Act of 1934, as amended, 47 U.S.C. § 401(b) ("Act"), was not intended by Congress to encompass a rulemaking order of the FCC, and hence, that such order is not subject to enforcement by a private party in a civil action.² The term "order" in Section 401(b) must be narrowly construed to mean an adjudicatory order, and not a rulemaking order.³ Any other construction of that section is inconsistent with

¹ Section 401(b) provides in pertinent part:

If any person fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Commission or any party injured thereby, or the United States, by its Attorney General, may apply to the appropriate district court of the United States for the enforcement of such order.

² Whether a state regulatory commission can be deemed a "person" within the meaning of Sections 401(a) and 401(b) is addressed in Petitioner's brief. However, that issue need not be reached if the Court concludes that the "orders" enforceable by a private party under Section 401(b) do not extend to rulemaking orders.

³ In *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 742 F.2d 1 (1st Cir. 1984), *pet. for cert. filed*, 53 U.S.L.W. 3460 (U.S. Dec. 5, 1984) (No. 84-900), the Court discusses the language and history of Section 401(b) and concludes that the term "order" as used in that section must be restricted to an adjudicatory order. In addition, a federal district court in Maine concluded, based on the history of Section 401(b), that a declaratory order is similarly not an "order" within the meaning of Section 401(b). *See, e.g., New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 565 F.Supp. 949 (D. Maine 1983).

(Footnote continued on following page)

congressional intent for two reasons: (1) Congress could only have intended to confer on the FCC the sole authority to enforce its quasi-legislative rulemaking orders because such orders are the functional equivalent of the provisions of the Act itself which the FCC alone enforces; and (2) the fundamental goals of consistency and judicial efficiency in the administration of the Act and in the resolution of disputes arising therefrom are served only if the FCC is given exclusive authority to enforce its rulemaking orders.

ARGUMENT

I. The FCC's Exclusive Authority to Enforce Its Rulemaking Orders Is Necessary for the Same Reasons As Its Exclusive Authority to Enforce the Act Itself

There is no dispute that the FCC, and not private parties, has exclusive responsibility for enforcement of the Act itself under Sections⁴ 401(a) and 403.⁵ *Massachusetts Universalist Conven-*

The sections of the Interstate Commerce Act upon which Sections 401(a) and 401(b) are modeled have since been repealed and recodified without substantive change into 49 U.S.C. §§ 11703(a) and 11705(a). Congress has clarified that the Interstate Commerce Commission may enforce a "regulation" under Section 11703(a) (formerly, Section 20(9) upon which Section 401(a) is modeled). A private party, however, may only enforce an "order" under Section 11705(a) (formerly, Section 16(12) upon which Section 401(b) is modeled).

⁴ Unless otherwise indicated, all statutory references are to Title 47 of the United States Code.

⁵ Section 401(a) provides:

(a) The district courts of the United States shall have jurisdiction, upon application of the Attorney General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of this chapter by any person, to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

Section 403 provides:

The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this chapter or

tion v. Hildreth & Rogers Co., 183 F.2d 497, 500 (1st Cir. 1950); *Lechtner v. Brownyard*, 679 F.2d 322, 327 (3rd Cir. 1982); *McIntire v. Wm. Penn Broadcasting Co. of Philadelphia*, 151 F.2d 597, 600 (3rd Cir. 1945), *cert. denied*, 327 U.S. 779 (1946). The dispute is whether the FCC's rulemaking orders fall outside those "orders" which a private party may enforce under Section 401(b), and hence, can only be enforced by the FCC under Sections 401(a) and 403.

Because the FCC's rulemaking orders are the functional equivalent of the provisions of the Act itself, Congress could only have intended to confer exclusive responsibility on the FCC to enforce such orders. Unlike an adjudicatory order which determines the rights of and binds private parties in a particular proceeding, *Columbia Broadcasting Co. v. United States*, 316 U.S. 407 (1942), a rulemaking order is quasi-legislative, and uniformly and prospectively applicable to an entire industry or affected class. *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973). Its purpose is to "[fill] in the interstices of the Act," *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947), and thereby become "the source of law that the court and agency must enforce." *American Trucking Ass'n v. United States*, 688 F.2d 1337, 1341 (11th Cir. 1982), *rev'd on other grounds*, *ICC v. American Trucking Ass'n*, — U.S. —, 104 S.Ct. 2458 (1984); *see also Batterton v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Atchison, Topeka & Santa Fe Ry. v. Scarlett*, 300 U.S. 471, 474 (1937). Accordingly, the FCC must have exclusive responsibility to enforce its rulemaking orders, just as it enforces

concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this chapter, including the power to make and enforce any order or orders in the case, relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money.

the provisions of the Act itself, under Sections 401(a) and 403.⁶ No other construction is consistent with congressional intent.

II. The Fundamental Goals of Consistency and Judicial Efficiency Which Underlie the Communications Act Are Served Only if the FCC Has Sole Discretion to Enforce Its Rulemaking Orders.

The fundamental goals of consistency and judicial efficiency which Congress sought to attain by enacting the Communications Act can only be served by vesting exclusive authority in the FCC under Sections 401(a) and 403 to enforce its validly adopted rulemaking orders. In contrast, private party enforcement of such orders under Section 401(b) would invite inconsistency and inefficiency.

In enacting the Communications Act, Congress set forth three basic policies: (1) to achieve a unified and coherent interstate communications policy; (2) to centralize authority in a single body to effectuate this policy; and (3) to entrust enforcement of the Act to the FCC exclusively to administer this policy. Section 151.⁷ Each of these policies, individually and together, reflects Congress' intention that interstate communications policy be consistent in its interpretation, application and enforcement, and that disputes arising under the Act be efficiently resolved by the FCC in the first instance and not the courts. Precluding private party enforcement of FCC rulemaking orders under Section

⁶ The very rulemaking order which is the subject of the instant enforcement action aptly demonstrates the close similarity between a rulemaking order and a provision of the Act. Assuming *arguendo* the validity of this order, the FCC bases its preemption theory primarily on Section 220 of the Act. Enforcement of the order thus requires enforcement of Section 220 itself, which only the FCC may pursue.

⁷ Two other policies, promotion of national defense and safety of life and property, have little if any relevance to this case. In any event rulemaking orders which further these policies would be enforceable solely at the discretion of the FCC, as discussed herein.

Congress has also reserved the regulation of intrastate communication service exclusively to the states under Sections 152(b) and 221(b).

401(b) is the only construction of that section which satisfies congressional intent.

A. Reserving Enforcement of Rulemaking Orders Exclusively to the FCC Promotes Soundness and Consistency in the FCC's Adopted Policies

By giving the FCC sole discretion to determine whether and to what extent it should enforce its validly promulgated rulemaking orders, Congress sought to enable the FCC to assure the soundness and consistency of its orders in adopting a unified and coherent interstate communications policy. A construction of the Act which permits private party enforcement of rulemaking orders would thwart the FCC's ability to achieve these goals.

The decision to enforce a given rulemaking order necessarily involves a complicated balancing of a number of factors which are peculiarly within the expertise of the FCC. The FCC itself, and not a private party who stands to benefit from enforcement, is most competent to make a threshold determination of whether a violation has in fact occurred. Likewise, the FCC is most capable of deciding whether enforcement is likely to further its overall policies and the broad public interest which it is mandated to protect. *Cf. Town of Hallie v. City of Eau Claire*, 471 U.S._____, 85 L.Ed.2d 24, 34, 105 S.Ct. 1713, 1720 (Mar. 27, 1985) ("Where a private party [acts], there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.")

If an enforcement proceeding is warranted, the FCC is similarly in the best position to ascertain whether the theory underlying the rule can reasonably and fairly be translated into actual practice in a given situation. Application of a particular rule, for example, may indicate that the theory is unsound in some circumstances or that the rule is flawed or impractical in some material sense. Likewise, the FCC may find that the rule can be interpreted in unintended ways or have unintended effects. The FCC may also find that the rule does not address a specific concern, or that it fails to apply to a particular situation or to specific classes of persons. Alternatively, the FCC may wish to carve out an exception to the rule for certain classes of persons or

for unique circumstances. In short, in an enforcement proceeding, the FCC is given the flexibility and discretion to clarify, modify, or even rescind the rule.⁸ None of these options for crafting sound and consistent interstate communications policy is available if a private party is permitted to enforce a rulemaking order under Section 401(b).⁹

Furthermore, the practical consequence of permitting private party enforcement, in the absence of FCC intervention, is to transfer the responsibility for interpreting and applying the FCC rule or standard from a single expert agency to a district court.¹⁰ Not only is this contrary to the express policy of Congress to centralize authority in the FCC, but such action invites the real possibility of misinterpretation or misapplication of FCC policy. The number of inconsistent interpretations or applications may be greatly compounded if private parties decide to sue in any of the

⁸ This flexibility and discretion in an enforcement proceeding is consistent with the FCC's continuing jurisdiction under Section 416 to modify or suspend its rulemaking orders at any time upon proper notice and procedure.

⁹ Although it may be argued that the FCC could conceivably intervene in numerous private enforcement actions, allowing such actions necessarily deprives the FCC from making the determination whether enforcement is even warranted in the first place. Moreover, through intervention, the FCC may find itself defending against numerous and improper interpretations or applications of its rulemaking order by private parties who seek to further their own, and not the public interest. Since courts accord considerable deference to the agency's own interpretation and application of its orders, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965), it is appropriate to let the FCC alone initiate enforcement actions. Moreover, in the event that numerous enforcement actions are warranted, reserving enforcement of FCC rulemaking orders to the FCC alone permits the FCC to initiate its own proceedings pursuant to Section 403 and thereby conserve its limited resources.

¹⁰ This is not to suggest that a district court's authority is simply ministerial. Even in an enforcement action brought by the FCC, a district court would clearly retain the authority to refuse to enforce a given rulemaking order against a particular person if the order on its face did not support the specific enforcement action against such person.

700 district courts. Private enforcement actions thus may undermine the unified and coherent interstate communications policy which Congress sought to achieve.¹¹

Enforcement of FCC rulemaking orders by a regulated entity against state regulatory commissions is particularly troublesome. Assuming *arguendo* that state commissions are even subject to FCC rulemaking orders, they must have consistent and certain guidance from the FCC regarding the interpretation and application of such orders. If private parties are allowed to sue state commissions in numerous federal district courts in piecemeal fashion, leading to varying and potentially inconsistent analyses of a valid FCC rulemaking order, state commissions will be faced with great uncertainty in deciding how to achieve compliance with the order.¹²

In addition, the necessity for a state commission to defend one or several federal court actions will siphon off already strained resources, which otherwise would be devoted to the regulation of intrastate rates and services, and could well result in significant interference with intrastate ratemaking processes. The FCC, and not private parties, is in the best position to assess the benefits of enforcement in relation to the burdens on all parties created by such action.

¹¹ The important interests of uniformity and coordination in the administration of complex regulatory statutes underlying the doctrine of primary jurisdiction are the same interests which *amici's* construction of Section 401(b) advances. *United States v. Western Pacific R.R.*, 352 U.S. 59, 64-65 (1956); *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970).

¹² For example, a federal district court in Louisiana not only enjoined the state commission to comply with the FCC Preemption Order, it also prohibited the state commission from making an offsetting rate adjustment to reflect the lower financial risk associated with adopting the FCC's depreciation methods. *Louisiana Pub. Serv. Comm'n v. South Central Bell Tel. Co.*, 570 F.Supp. 227 (M.D. La. 1983). In contrast, a federal district court in Maine allowed the state commission to make such an offsetting adjustment. *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, 579 F.Supp. 1356 (D. Maine 1984).

B. Reserving Enforcement of Rulemaking Orders Exclusively to the FCC Promotes Judicial Efficiency

The goal of judicial efficiency is served if disputes arising from the administration of the Act are resolved in the first instance by the FCC and not the courts.

First, private enforcement under Section 401(b) of a rulemaking order may lead to the premature or unnecessary use of judicial resources by depriving the FCC of the opportunity to determine in the first instance whether it is in the public interest to enforce an order whose validity has been seriously questioned and which will likely be challenged in the appellate courts. In such an instance, the FCC may well choose to defer enforcement or alter the substance of its order in some material respect, thereby obviating the necessity for a court to consider the claim.

In addition, the unnecessary expenditure of judicial resources may be required to preserve the due process rights of persons not parties to and lacking actual notice of an FCC rulemaking order,¹³ notwithstanding the availability of statutory procedures to protect these rights. Specifically, under the Communications Act, when a person not a party to a rulemaking order learns that he is subject to the rule, he has several options available to him if he desires to challenge the rule. He may petition for reconsideration of the rule before the FCC under Section 405. If he is unsuccessful, he may then seek appellate review of an adverse order under Section 402. Additionally, he may seek a declaration of his rights from the FCC, or petition the FCC to repeal or waive the rule pursuant to 47 C.F.R. §§ 1.2 and 1.401(a), respectively.

These remedies not only allow the FCC to determine in the first instance whether the rulemaking order should be enforced against such a person, but also afford the person actual notice and an opportunity to be heard by the agency before enforcement is

¹³ Not infrequently rules are adopted and made applicable to persons who lack actual notice of such effect. This is not surprising given the numerous notice of rules published in the Federal Register.

sought.¹⁴ However, a private party's forging ahead to enforce the rulemaking order in federal court may deprive such person of these remedies, and thereby needlessly compel the courts to fashion judicial remedies to protect the person's due process rights.¹⁵ The interest of efficient administration of justice will thus be undercut if a private party is allowed under Section 401(b) to enforce a quasi-legislative rulemaking order.

A private party who is aggrieved by the failure of a person to comply with an FCC rulemaking order, however, is not without a remedy if the FCC is given exclusive authority to enforce such orders. Such a party may seek enforcement of the order before the FCC itself under Section 403 and thus spare the use of judicial resources. Alternatively, such party may request that the FCC institute a civil action under Section 401(a). In either case, the private party has a forum to assert and protect its interests.

Second, private enforcement of the FCC's rulemaking orders may lead to litigation of one case in two separate forums, and thereby create unnecessary procedural and substantive complexity with resultant delay and expense. For example, in *New England Tel. & Tel. Co. v. Pub. Util. Comm'n of Maine*, *supra*, n.3, the telephone company challenged several aspects of a decision issued by the state regulatory commission in state court. However, the company specifically severed the issue of depreciation expense and instead pursued this issue in federal district court by seeking

¹⁴ Moreover, considerations of fairness require that the person against whom enforcement is sought have the benefit of the FCC's own interpretation and application of its rule to his particular situation. The opinion of a private party whose own interests will undoubtedly color its interpretation, or the decision of a court which lacks the resources to deal with often complex variables underlying the rulemaking order, cannot adequately substitute for the expert judgment of the FCC.

¹⁵ This problem does not arise if private party enforcement is limited under Section 401(b) to enforcement of adjudicatory orders. Unlike a rulemaking order, where a valid adjudicatory order has been issued, a person against whom enforcement is sought has been given actual notice and an opportunity to challenge the proposed action before the FCC and the U.S. Court of Appeals.

to enforce the FCC Preemption Order against the state commission. As the First Circuit recognized, the state court could well have been left with determining the validity of a rate order which critically depended in part on the resolution of the depreciation issue which was not before it. And the federal district court would have been compelled to evaluate compliance with the FCC Preemption Order in a virtual ratemaking vacuum. The First Circuit instead chose not to allow private party enforcement of the FCC rulemaking order.

Third, private enforcement of a rulemaking order may cause a federal district court to delve unnecessarily into state administrative processes.¹⁶ For example, in *South Central Bell Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 744 F.2d 1107 (5th Cir. 1984), *appeal filed*, 53 U.S.L.W. 3449 (U.S. Nov. 30, 1984) (No. 84-870), the district court required the state regulatory commission to raise the telephone utility's allowable rate of return and thereby increase rates by some \$40.5 million in order to exact what it thought to be compliance with the FCC Preemption Order. The actual scope of the district court's power had thus arguably extended well beyond simple enforcement of the FCC order and into the domain of the intrastate ratemaking process.¹⁷ Such

¹⁶ Such action, moreover, thwarts the intent if not the letter of the Johnson Act, 28 U.S.C. § 1342, whereby Congress intended that intrastate ratemaking issues should be resolved in state administrative agencies and state courts.

¹⁷ A potentially more serious intrusion into state ratemaking processes is demonstrated by a federal district court enforcement action in Kentucky. There South Central Bell Telephone Company has alleged that the Kentucky Public Service Commission has failed to comply with the FCC Preemption Order, notwithstanding the Kentucky Commission's assertion to the contrary. The utility concedes that the state commission has applied the depreciation methods prescribed by the FCC. Indeed, the Kentucky Commission allowed the utility to use those methods before the FCC mandated their adoption. As a factual matter, the Kentucky Commission has also granted \$9.7 million in additional revenue in the past to cover increased depreciation expense which resulted from the use of those methods. Nonetheless, the utility claims that it deserves another \$7 million in annual revenues to cover increased

intrusion need not occur at all if private enforcement is precluded under Section 401(b).

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted,

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depreciation expense resulting from the use of the FCC depreciation methods. The state commission rejected that claim on the basis that the utility can absorb this expense while at the same time realizing its authorized rate of return. The federal district court is thus being asked to determine if the actual rates authorized by the state commission reflect compliance with the FCC Preemption Order. *South Central Bell Tel. Co. v. Kentucky Pub. Serv. Comm'n*, Civ. No. 85-02 (E.D. Kent. 1985). See also n.16, *supra*.

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